FILE COPY.

Supreme Court, U. S.
FILED
NOV 23 1905
JAMES H. KEENEY,
Clerk.

Supreme Court of the United States.

OCTOBER TERM, 1905.

GEORGE F. ALBRIGHT, *Appellant,*
vs.
THE TERRITORY OF NEW MEXICO,
ex rel. JESUS M. SANDOVAL.
No. 229.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

BRIEF OF APPELLANT ON MOTION TO DISMISS APPEAL.

WM. B. CHILDERS,
Attorney for Appellant.

CITIZEN PRESS, ALBUQUERQUE, N. M.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

GEORGE F. ALBRIGHT, *Appellant*,
vs.
THE TERRITORY OF NEW MEXICO,
ex rel. JESUS M. SANDOVAL.
No. 229.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

BRIEF OF APPELLANT ON MOTION TO DISMISS APPEAL.

WM. B. CHILDERS,
Attorney for Appellant.

STATEMENT OF THE CASE.

The appellant, George F. Albright, was appointed to the office of assessor of the County of Bernalillo on the 27th day of March, 1903, to hold said office until the first day of January, 1905. Proceedings were brought against him by the relator, claiming to have been elected to said office at the regular election held on the 4th day of November, 1902. (*Transcript, page*

3). Judgment was rendered in the district court in favor of the appellant, Albright, and an appeal was taken to the supreme court of the territory, and on the 13th day of September, 1904, the said judgment was reversed, and on the 17th day of October, 1904, a mandate was issued from the supreme court of the territory to the district court, commanding the court to reinstate said cause and proceed in accordance with the views of the court expressed in the opinion of the court on file. This opinion is found in the *record, pages* 38 *to* 45 *inclusive,* and also in 78 *Pacific Reporter* 204. The opinion of the district court, the court below, is found on *pages* 45 *to* 54 *inclusive,* but it is not material for the purposes of this motion.

Upon the mandate being filed in the court below, a rehearing upon said cause resulted in a judgment against the respondent and appellant, ousting him from his office and awarding the office to the relator. (*Trans. p.* 20, *folios* 32-33.) From that judgment a writ of error was sued out by the appellant to the supreme court of the territory. Thereupon said cause was heard before the supreme court upon a motion of the defendant in error to affirm or dismiss and to quash the supersedeas therein, and also upon the merits of the cause. Upon said hearing the supreme court overruled said motions to dismiss the writ of error and to quash the supersedeas and modified the judgment of the court below by striking out of the same the words, "And that he forthwith deliver up to the relator the records, books, papers, furniture and all other things appertaining to the office of assessor of the County of Bernalillo and Territory of New Mexico, as the lawful custodian thereof," and otherwise affirmed said judgment (*Trans. p.* 23, *folio* 36).

From this judgment of affirmance, the appellant has sued out his appeal. The appellee did not appeal from the action of the court overruling his motion to dismiss the writ of error and quash the supersedeas.

I.

The territorial supreme court in its opinion upon the second hearing of said cause considered quite fully the question raised by the appellee upon this motion to dismiss. We do not agree entirely with appellee's statement of the grounds upon which the supreme court of the territory placed its action in refusing to dismiss the writ of error and quash the supersedeas. We are, however, concerned here only with the question of the refusal to dismiss the writ of error. The opinion of the supreme court, which is found on *pages* 55 62, *inclusive, of the transcript,* and also in 79 *Pacific Reporter* 719, is so full and complete that we might content ourselves with resting on that opinion so far as it fully discusses the authorities on the subject of the right to have a review of the judgment on appeal after the expiration of the term of office involved in the proceeding in *quo warranto.* The court does not expressly and exclusively place its refusal to dismiss the writ of error upon the ground that the statute of 9th Anne, being a part of the common law of New Mexico, authorizes the imposition of a fine against one who usurps an office or franchise; nor upon the second ground suggested, that the judgment in the case might affect the rights of the parties in another litigation—although those would have been sufficient ground upon which to place it. The opinion of the court speaks for itself.

This court has already held that in a proceeding by information in the nature of *quo warranto,* a super-

sedeas will be granted. In the case of *United States vs. Addison*, 22 *Howard*, the circuit court rendered a judgment of ouster against the defendant and he sued out a writ of error, which operated as a supersedeas to the judgment. The defendant in error, alleging that the court had no jurisdiction of the writ of error, applied for a mandamus commanding the circuit court to issue process for the execution of the judgment. It was contended in the case that a writ of error would not lie to review the decision in the proceeding in the nature of *quo warranto* and that the remedy was inappropriate and ineffectual for the same reasons as contended for by appellee here. As to this the court said:

"But it is said that the remedy by writ of error is inappropriate and ineffectual, as the office of the relator will expire about the time the writ of error is made returnable. This may be a defect in the law, which the legislative power only can remove. A writ of error returnable *instanter* would give more speedy relief, and might be more satisfactory, but we must administer the law as we find it.

"The bond and security given on the writ of error cannot be regarded as an idle ceremony. It was designed as an indemnity to the defendant in error should the plaintiff fail to prosecute with effect his writ of error.

"We can entertain no doubt that the writ of error is the legal mode of revising the judgment of the circuit court in this case; and that security having been given on the judgment, as the law requires, it is superseded."

United States vs. Addison, 22 *How.* 174.

This court thus clearly recognized the right to

have a review of the judgment of the court below in *quo warranto* cases although the cause might not be heard and determined in the appellate court before the final expiration of the term of office. In this case as there a supersedeas was given when the appeal was taken, and a previous supersedeas had been given when the writ of error was sued out in the supreme court of the territory. In fact an appeal to the supreme court of the territory is only one step towards reaching this court. The supersedeas bond on this appeal will be found in the *record at pages 25 to 27, inclusive.*

One of the motions passed upon by the supreme court of the territory, as already pointed out, was a motion to quash the supersedeas, which could only be granted under the laws of the territory upon the giving of a bond, which was given, in order to secure a supersedeas pending the hearing in the supreme court of the territory. So that the two cases are exactly alike in this respect, the cause was on its way to the Supreme Court of the United States from the time the writ of error was sued out and the bond given in the district court, before the expiration of the term of office, the writ of error having been sued out from the district court immediately following the judgment in the district court on the 19th day of November, 1904. The record shows that the assignment of error was filed in the supreme court of the territory on the 23rd day of December, 1904. (*See Trans. p. 21 folio 34*). So that the case was pending in that court upon the supersedeas bond given in the district court before the expiration of the term of office. These two bonds are evidently to be treated as one.

In the case above cited, *U. S. vs. Addison*, 22 *How., supra.*, a suit was afterwards brought upon the

bond, and this court said:

"By the judgment of ouster against Addison, his right to the office of mayor was determined..... By the writ of error and the suspension bond the enforcement of the judgment was prevented, and until the writ was dismissed the relator was excluded from the office and deprived of the salary connected with it. The amount of the salary received by the defendant Addison, during the period of such deprivation, constitutes, under the decision in the mandamus case, (22 *How., supra.*) the measure of the damage which the plaintiff is entitled to recover upon the suspension bond."

United States vs. Addison, 2 *Wall.* 291-297.

The force and effect of the two cases last above cited has never in any way been modified by any decision of this court.

III.

The fees and emoluments for assessors in the Territory of New Mexico are fixed by statute, as follows:

"The assessors shall be paid four per cent of all taxes and licenses collected under their assessments in their respective counties, which per cent shall be payable to said assessors by the treasurer to whom said taxes and licenses are by law payable, out of any of such taxes and licenses so paid in to such treasurers, and said per cent. shall be due and payable to said assessors by said treasurers respectively, upon order of the board of county commissioners immediately upon receipt by such treasurers of sufficient funds for that purpose from said taxes and licenses."

Compiled Laws of N. M., of 1897, *Sec.* 1794.

So that the appellant in this case, having been the actual incumbent of the office of assessor of the County of Bernalillo from the date of his appointment in March, 1903, unquestionably until the date of his ouster under the judgment rendered by the district court in November, 1904, all fees and emoluments collected by him after the giving of the supersedeas bond in the district court are in question in this case, and if the case was dismissed he and his boudsmen would be liable for all said fees and emoluments. As the fees are payable out of taxes when collected, they could and did amount to several thousand dollars. Undoubtedly, within the rule laid down in 6 *Wall., supra.*, he would be liable for all fees and emoluments received by him during the period of deprivation of office by reason of the giving of said supersedeas bonds. See,

U. S. vs. Addison, 22 *How., and* 6 *Wall., supra.*

It certainly could not be said that this does not furnish a reason why this appeal should be heard, and as the court below contends in its opinion, that this case should be heard on appeal in order to finally settle the rights of the relator to recover such fees. The presumption certainly is that the actual incumbent of the office received them.

IV.

Again; to enforce the doctrine contended for by the appellee in this case and dismiss this appeal would be in effect to deprive the claimants of office from ever having a review of their cases under the statute which gives them such review. The time that the appellant was appointed to his office, in March, 1903, to the first of January, 1905, was not sufficient for this

cause to have been tried and heard in the district and supreme courts of the Territory and reach this court for review; and would deprive him of the right of appeal given him by the statute, unless this court holds as it did in *United States vs. Addison*, 22 *How., supra.*, when it said:

"But it is said that the remedy by writ of error is inappropriate and ineffectual, as the office of the relator will expire about the time the writ of error is made returnable. This may be a defect in the law, which the legislative power only can remove. A writ or error returnable *instanter* would give more speedy relief, and might be more satisfactory, but we must administer the law as we find it.

"The bond and security given on the writ of error cannot be regarded as an idle ceremony. It was designed as an indemnity to the defendant in error should the plaintiff fail to prosecute with effect his writ of error.

"We can entertain no doubt that the writ of error is the legal mode of revising the judgment of the circuit court in this case; and that security having been given on the judgment, as the law requires, it is superseded."

United States vs. Addison, 22 *How., supra.*

V.

We are aware that this court in the case of *Tennessee vs. Condon*, 189 United States, dismissed an appeal from the supreme court of Tennessee, involving the title to offices in that state. The suit, however, was brought in equity under the statutes of the state of Tennessee and was not a suit in the nature of *quo war-*

ranto, brought in the name of the state, for the purpose of determining title to office. It was instituted at the instance of persons superseded in public office by an act of the general assembly. The court says:

"In the circumstances this case assumed the aspect of a civil contest between individuals, and not of a prerogative writ to correct ursurpation of office."

Tennessee vs. Condon, 189 *U. S.* 68.

The suit was brought by the Attorney General and in the name of the Attorney General, and it does not detract from the fact that it was a public proceeding although it was brought at the instance of a private relator claiming the office. In the opinion in this case, it is said:

"There are cases in *quo warranto* in which judgment of ouster has been entered although the term of the person lawfully entitled had expired, and also where informations had been retained, when the statute provided for fine or damages, but here the proceedings can not be maintained as on behalf of the public, and considered, as counsel insists it should be, as merely a contest between two sets of officials and not between the state and its officials, the state courts would be at liberty to treat it as abated, and the mere matter of costs cannot be availed of to sustain jurisdiction. See *Poring vs. Griffith*, 1 Heiskell, 456, 461; *State vs. McConnell*, 3 Lea 332; *Williamson County v. Perkins*, 39 S. W. Rep. 347; *State v. Lindsey*, 103 Tennessee, 625, 635."

Tennesse vs. Condon, 189 *U. S.* 70.

It is not a mere question of fine or damage which may be recovered under the act of 9th Anne in the case

at bar but the Tennessee case was clearly merely a contest between two sets of officials and not between the state and its officials, and the state court will be at liberty to treat it as abated, and as stated here, the mere matter of costs cannot be availed of to sustain jurisdiction. The opinion quotes decisions of the State of Tennessee holding to this effect.

Besides the only question before the court in this case was a federal question, as to whether the act of the legislature was in conflict with the XIVth Amendment and as the court says, its decree would clearly be ineffectual for any purpose whatever as the state court would not be bound to render any judgment different from the judgment already rendered.

And our contention does not in any way detract from the case of *Mills vs. Green*, cited in the opinion, that this court should not decide the case, "that when, pending an appeal from the judgment of the lower court, and without any fault of the defendant, an event occurs which renders it impossible for this court, if it should decide in favor of the plaintiff, to grant him any effectual relief whatever, the court will not proceed to a formal judgment, but will dismiss the appeal" Citing *Mills vs. Green*, 159 U. S. 651, 653.

Id., page 71.

We insist that this case, upon the reasoning of the court below the authorities there cited, is not brought within that principle and that the appellant, if the decision should be in his favor, would secure from this court effectual relief,—relief from accounting for the fees and emoluments of the office received by him while he was the actual incumbent, if he is shown to have been the lawful incumbent thereof, and also, from the possible imposition of a fine, if the case should be

reversed.

VI.

Among the cases cited by the court below in its opinion, we expressly call attention to the following:

People upon the relation of Swan vs. Loomis, 8 *Wend.* 396.

People vs. Hartwell, 12 *Mich.* 508.

Hunter vs. Chandler, 45 *Mo.* 452.

State vs. Pearce, 35 *Wis.* 93.

Commonwealth vs. Jackson, 45 *Pa. St.* 49.

People vs. Rogers, 118 *Calif.* 394.

Dean vs. State, 56 *Nber.* 302.

Hammer vs. State, 44 *N. J. L.* 671.

Also, *Commonwealth vs. Smith,* 45 *Pa. St.* 60.

In the latter case, it is said:

"I have no doubt that *quo warranto* brought within the term of an office, may be well tried after the term has expired."

As the court below points out, a number of these decision are from states which, like New Mexico, have no staututory provision as to *quo warranto,* and are thus squarely in point. We add that an examination of the authorities from other states will show that the statutes are merely declaratory of the provisions of the statute of 9th Anne, which, as the court undoubtedly correctly holds, is a part of the common law in New Mexico.

We can add nothing to what the court below said in regard to the effect of this decision on the right to recover the emoluments of office.

See Transcript, page 59, *folio* 71.

And the review of the decision *contra,* and some of

them seemingly against the conclusions of the court, is so full and satisfactory that we shall not attempt to add anything to it.

See Transcript, folios 72-73.

State vs. Porter, 58 *Iowa* 19; 11 *N. W.* 715. Is a case which holds:

"The relator asks that he be adjudged and decreed to be the lawful subdirector, and that the defendant be ousted and excluded from office. The term of the office having expired, the court could not grant this relief. No fees attach to the office of subdirector, and hence neither party had anything to gain or lose by further litigation. Courts are not organized for the purpose of determining mere abstractions."

In *People vs. Seaman,* 5 *Denio* 409, it was expressly held:

"The year for which this election was made has passed, and there can be no judgment of ouster, and the relator cannot be put into office, but he is still entitled to judgment and to his costs. People vs. Loomis, 8 Wend. 396.

"Judgment for plaintiff."

VII.

We submit that the position of the appellee that the judgment was self-executing and no appeal or supersedeas would lie therefrom, is not sustained by authority. Neither the case of *Foster vs. Kansas,* 112 United States, nor *Wilson vs. North Carolina,* 169 United States, were intended to overrule the proposition laid down in the case of *United Staets vs. Addison,* 22 How. and 6 Wall., *supra. Foster vs. Kansas* only determined whether the writ of error could oper-

ate as a supersedeas. An examination of *Wilson vs. North Carolina* shows conclusively that neither of these cases apply to the case at bar. The last case also shows what this court held to be the effect of giving the bond in *United States vs. Addison*, 22 How. *supra*, that immediately upon the giving of proper bond, further proceedings were stayed in the court below. They say:

"It was not a case where immediately upon the entering of the judgment of ouster the court had directed the possession of the office to be taken by the relator, who had taken possession accordingly. The court was asked to actively intervene to put the relator in possession of the office, notwithstanding the allowance of a writ of error and the filing of a bond. The court refused to do so, holding that the supersedeas bond stayed further proceedings under the judgment."

Wilson vs. North Carolina, 169 *U. S.* 598.

That is exactly our contention here.

An examination of the case of *Kimball vs. Kimball*, 174 U. S., shows that it has no application. It holds that the petitioner could not be appointed administratrix and that the letters of other persons had already been revoked and however the abstract question as to her right to have been appointed at the time she first made application may have been decided, it could have no effect whatever upon her rights by virtue of the decision which the court might render. So far as the federal question involved in that case, that is whether a court which granted a divorce had jurisdiction and whether full faith and credit had been given to the acts of the court granting the divorce in Dakota, was concerned, the question as to who was entitled to letters of administration on the estate of the deceased

was a mere moot question; and it appearing that this was true, the court correctly held that it would not take jurisdiction merely to determine that abstract question, upon which no relief could be had in the court below.

VIII.

This case is appealable to this court because it involves the validity of an authority exercised under the laws of the United States, namely, the power of the legislature of New Mexico to enact certain legislation.

See *Clayton vs. Utah*, 132 *United States*, 632.

IX.

The supreme court of the territory having refused to dismiss the appeal, the appellee here is not in a situation to complain of that error. The motion to dismiss in this case is equivalent to an assignment of errors on the part of the supreme court of New Mexico.

A party who does not take a writ of error or appeal cannot be heard to complain of an adverse ruling in the court below.

Bolles vs. Outing Co. 175 *U. S.* 262, and cases there cited.

American Ins. Co. vs. Canter, 3 *Peters* 318.

Chittenden vs. Brewster, 2 *Wall.* 191.

Clark vs. Killian, 103 *U. S.* 766.

Loudon vs. Taxing District, 104 *U. S.* 771.

Cherokee Nation vs. Blackfeather, 155 *U. S.* 218.

Respectfully submitted,

W. B. CHILDERS,

Attorney for Appellant.